18-812, 18-893

United States Court of Appeals
for the
Second Circuit

MEYER TOOL, INC.,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement of an Order and Decision of the National Labor Relations Board

REPLY BRIEF FOR PETITIONER-CROSS-RESPONDENT MEYER TOOL, INC.

Daniel G. Rosenthal
Ryan M. Martin
JACKSON LEWIS P.C.
PNC Center, 26TH Floor
201 E. Fifth Street
Cincinnati, OH 45202
(513) 898-0050

Attorneys for Petitioner-Cross-Respondent Meyer Tool, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

The National Labor Relations Board ("Board") cannot escape two fundamental facts that mandate against enforcing its Order in this case. First, the record before this Court – based on the admissions of Cannon-El himself – shows that Cannon-El engaged in no protected, concerted activity in the office of Human Resources employee Deanna Adams on May 26, 2016 that prompted Adams to call for police assistance or prompted Meyer Tool to suspend and discharge him. Second, even if Cannon-El engaged in some protected, concerted activity in Adams's office on May 26 (which he did not) binding precedent from this Court establishes that Meyer Tool lawfully discharged him for his unprotected and individual refusal to leave Adams's office and the premises. Meyer Tool's petition for review should be granted for these independently sufficient reasons.

II. ARGUMENT

A. Cannon-El Admits That He Failed To Engage In Any Protected, Concerted Activity In Deanna Adams's Office On May 26. Adams's Request That Cannon-El Leave, And Her Later Request For Police Assistance, Were Lawful. Meyer Tool Lawfully Discharged Cannon-El For His Individual Refusal To Comply With Adams's Order.

No rational fact finder could conclude that Cannon-El engaged in any protected concerted activity in Deanna Adams's office on May 26 based on the record before this Court.

In its brief, the Board continues to contend that Adams committed the pivotal unlawful acts in this case, which allegedly "escalated" the situation and "provoked" Cannon-El's clear misconduct (NLRB Brief pp. 20, 34). Based on the admitted evidence, however, Cannon-El said and did nothing in Adams's presence that is protected by Section 7. For proof, this Court need look no further than the admissions of Cannon-El and his co-workers – admissions that the Board ignores in its brief.

On May 26, 2016, Cannon-El arrived at Adams's office 10 minutes after Poff and Bauer. He was uninterested in what they had to say. He admits: "I wasn't personally trying to eavesdrop or listen in, so all I heard was talking. I listened to nothing in particular" (JA 50, TR 105).

Cannon-El expressed his own personal gripes and nothing else; he admits this. He griped about a claimed physical assault and a claimed racial slur, both directed solely at him. He admits: "I only talked about myself" (JA 52, TR 114). This conduct is not concerted or for anyone's mutual aid or protection.

The record simply does not support the Board's position, so the Board has stretched it in its brief. For example, the Board says, "After his colleagues had raised concerns about the meeting and other ongoing issues, employee Cannon-El brought up collective concerns about how management treated him at the meeting and about management accountability" (NLRB Brief p. 19). This is false. It is

what the Board wishes the record shows, but it does not. The admitted evidence is that Bauer talked only about the "go to guy" (JA 68, TR 178-79); then Poff arrived and his "whole concern" was "the night shift/day shift issue" (JA 98, TR 297); and Cannon-El's complaints, which he made 10 minutes later, were only about a claimed physical assault and claimed racial slur directed solely at him (JA 50-51, TR 106-07, 110; JA 126, TR 404-06).

The Board also falsely claims it determined that Poff made statements to Adams about the "go-to-guy issue" and "the meeting the night before" on May 26 (NLRB Brief p. 11). The Board made no such findings in its Order. Similarly, the Board's statement that "Bauer and Poff shared concerns about the so-called personal gripes of how Cannon-El was treated" during the meeting with Adams (NLRB Brief p. 39) is not supported by any citation to the record. What the record actually shows is that no one previously raised allegations to Adams (or anyone else in management) that Cannon-El had been assaulted or that he had been racially slurred. And these are the only complaints Cannon-El raised to Adams.

Recognizing this, the Board found (and argues in its brief) that Cannon-El's complaint that he was the victim of a racial slur is close enough to Poff's complaint that day shift employees were treated better than night shift employees so that Cannon-El's complaint should be considered concerted. (NLRB Brief p. 28) No reasonable person would make a connection between these statements because

there is none. Cannon-El's comments were not conceivably for anyone else's mutual aid or protection.

Nor did Cannon-El's comments prompt the call for the police, which cannot be unlawful based on *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 90 (D.C. Cir. 2015) ("[W]e conclude that the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection under the *Noerr-Pennington* doctrine."). What prompted the call was Cannon-El's defiant, individual refusal to obey Adams's lawful order to leave. The Board did not find that the order to leave was unlawful, as it clearly was not.

The Board's argument that Meyer Tool violated the Act even if Cannon-El engaged in no protected activity in Adams's office because "the investigative committee, which ultimately recommended Cannon-El's discharge, had a full picture of Cannon-El's and his colleagues' protected, concerted activity" (NLRB Brief p. 29) is a sleight of hand. There is zero evidence Meyer Tool suspended and discharged Cannon-El for anything but his individual refusal to leave Adams's office and the premises, and for no other reason. And, as discussed below, Cannon-El's refusal to leave is not protected under this Court's decision in *Ontario Knife v. NLRB*, 637 F.2d 840 (2d Cir. 2012).

Indeed, the investigative committee's entire rationale for recommending Cannon-El's discharge was his "repeatedly refusing to leave the premises when

requested" (JA 221). The Board again mischaracterizes the record by insinuating that the committee must have based its decision on some other activity because its recommendation references Cannon-El "intentionally intimidating and threatening" employees, causing them to feel unsafe, without specifying "what he had done" that was intimidating or threatening (NLRB Brief p. 29, n. 4). What the Board fails to realize (or admit) is that it was Cannon-El's refusal to leave that was intimidating and threatening (*See also* JA 180, TR 621 (investigative committee recommended Cannon-El's discharge because of his individual refusal to leave)). Indeed, Cannon-El's individual refusal to leave is the only activity referenced in the committee's investigation report. The Board cannot prove some ulterior motive for Cannon-El's discharge by simply ignoring the record evidence.

Finally, the Board falsely attacks Meyer Tool's arguments, claiming that Meyer Tool "makes no effort to argue, as it must, that 'no rational trier of fact could reach the conclusion drawn by the Board'" (NLRB Brief p. 38) and that Meyer Tool "cherry picks portions of the record" to create "its own narrative" (NLRB Brief p. 21, 38). Meyer Tool repeatedly explains in its brief why no rational fact finder could conclude on this record that Cannon-El engaged in any protected, concerted activity in Adams's office on May 26 (See, e.g., Meyer Tool Brief p. 3-4, 19, 24). As to the record, Cannon-El's admissions sink the Board's case.

B. Cannon-El's Individual Refusal To Obey Adams's Lawful Order To Leave Is Not Protected Based On This Court's Decision In *Ontario Knife*. His Discharge Was Lawful And Mandates Against Enforcement Of The Board's Order.

This Court's decision in *Ontario Knife v. NLRB*, 637 F.2d 840 (2d Cir. 2012), which the Board itself relied on in *Meyers Industries*, 281 NLRB 882 (1986), is directly on point and mandates against enforcing the Board's Order.

The facts in *Ontario Knife* are strikingly similar to those presented here. The relevant employees, Cobado and Swift, had been "complaining for a long time over what they considered to be an excessive assignment of machete work to the night shift," including on the day before Cobado was discharged. *Id.* at 841. Cobado and Swift had even determined that they would "refuse" the next time they were given machete work. *Id.* at 842. After management again assigned machete work to their shift, Cobado made the "spur-of-the-moment" decision to walk out after her supervisor – in response to Cobado's and Swift's verbal complaints – stated, "If there is a thing on there (the day foreman's list) that says you have to kiss my ass, that is what you are going to do." *Id.*

The Board in *Ontario Knife*, as in this case, found that "Cobado and Swift were engaged in group action up to the point when Cobado walked out alone" and, as a result, it followed "that Cobado's individual protest was protected because it involved a group concern[,] the work of all second-shift employees." *Id.* at 843. But this Court, as it should in this case, refused enforcement of the Board's order.

It determined that, although Cobado and Swift had been engaged in protected, concerted activities minutes before Cobado left the facility, Cobado's decision to walk out was an individual one and not protected by the Act. According to this Court: "While Cobado was doubtless speaking for Swift in the initial protest, she was not doing so in the act that led to her discharge." *Id.* at 845-46.

Cobado's actions in *Ontario Knife* are analytically identical to Cannon-El's individual defiance of a lawful order to leave. Cannon-El's individual refusal to leave and Cobado's individual walking out are flip sides of the same coin. The Board attempts to minimize Cannon-El's behavior by stating that he only "initially" disregarded Adams's lawful order to leave (NLRB Brief p. 43). The undisputed record evidence proves that he never complied, and Adams was forced to retreat. All witnesses who observed Adams during this time, including witnesses for the Board, agree that Adams was visibly shaken and crying (JA 101, 147-48, 564; TR 312, 488-89, 564). Cannon-El's refusal to leave was also not "brief," as the Board repeatedly claims (NLRB Brief p. 42-43). The time that elapsed between Adams's first ordering Cannon-El to leave and his leaving was at least 15 minutes (JA 54-55, TR 123-27). These undisputed facts show that the Board's allegation that Meyer Tool has presented an "exaggerated description" of the record (NLRB Brief p. 46) is wrong. Meyer Tool's description of the facts is based on the unrebutted testimony of witnesses on both sides of this dispute.

Moreover, Cannon-El admits that his individual refusal to obey Meyer Tool's lawful order to leave constituted trespassing (JA 54, TR 121), which the Supreme Court has confirmed cannot be protected as a matter of law. *See, NLRB v. Fansteel,* 306 U.S. 240, 255 (1939) (even in the context of protected concerted activity, discharge for trespass is lawful).

The Board's strained attempts to distinguish *Ontario Knife* are without merit and illustrate the decision's applicability here. Perhaps most telling of all is the fact that the Board tries to distinguish *Ontario Knife* by directly contradicting the legal conclusions upon which it relied in this case. On pages 42 and 43 of its brief, the Board states that Cobado's action in walking off the job was not protected because "there was no evidence that the coworker participated in, or approved of, the employee's walking off the job." Yet, in its Order in this case, the Board ruled, "Concertedness 'is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed'" (JA 236). The Board cannot have it both ways. Its decision to abandon its own legal conclusion in an effort to distinguish *Ontario Knife* establishes that its Order is contrary to binding precedent from this Court and cannot be enforced.

The Board's claim that "there was no split between Cannon-El and his coworkers," as there was between the employee who walked out and the employee who remained at work in *Ontario Knife* (NLRB Brief p. 43), is also false. Bauer

disagreed with Cannon-El's refusal to obey Adams's order to leave her office and the premises (JA 83-84, TR 240-41). In addition, "there [is] no evidence that [either Poff or Bauer] participated in or approved [Cannon-El's] impulsive…action." *See Ontario Knife*, 637 F.2d at 845. Both employees left Adams's office and the Human Resources building to go back to work while Cannon-El stayed. Neither employee was discharged.

Finally, the Board's assertion that this case is different from *Ontario Knife* because Cannon-El's misconduct "was a reaction to Adams' escalation and threat to call the police" (NLRB Brief p. 43) is untrue. In *Ontario Knife*, Cobado made the "spur-of-the-moment" decision to leave after her supervisor said, in response to her admittedly concerted complaint, "If there is a thing on there (the day foreman's list) that says you have to kiss my ass, that is what you are going to do." 637 F.2d at 842. The supervisor's conduct in *Ontario Knife* was much more egregious than Adams's request for police assistance after she was undisputedly scared by Cannon-El's conduct in her office.

Notably, the Board's argument in this regard also ignores that Adams's request for police assistance cannot, as a matter of law, be an unfair labor practice. *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 90 (D.C. Cir. 2015) ("[W]e conclude that the act of summoning the police to enforce state trespass law is a

direct petition to government subject to protection under the *Noerr-Pennington* doctrine.").

The Board does not and cannot meaningfully distinguish *Ontario Knife*, which is controlling here. *See also, Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993) ("[T]he Board must prove that the employee in question was 'acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense.'")

III. CONCLUSION

Cannon-El did not engage in protected, concerted activity in Adams's office on May 26, 2016. Nevertheless, his individual refusal to leave is unprotected as a matter of law, and Meyer Tool lawfully discharged him for this misconduct. For these reasons and the reasons set forth in Meyer Tool's brief, the Court should grant Meyer Tool's petition for review, deny the Board's cross application for enforcement, and reverse the decision and order of the Board in its entirety.

Respectfully submitted,

/s/ Daniel G. Rosenthal
Daniel G. Rosenthal
Ryan M. Martin
JACKSON LEWIS P.C.
201 E. Fifth Street, 26th Floor
Cincinnati, OH 45202
Telephone: (513) 898-0050
Facsimile: (513) 898-0051
daniel.rosenthal@jacksonlewis.com
ryan.martin@jacksonlewis.com

Attorneys for Petitioner-Cross-Respondent Meyer Tool, Inc.

Dated: November 15, 2018

CERTIFICATE OF COMPLIANCE

This Reply Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and Local Rule 32.1 because it contains 2,732 words.

This Reply Brief complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6) because it is in 14-point Times New Roman proportional font.

Dated: November 15, 2018

/s/ *Daniel G. Rosenthal*
Daniel G. Rosenthal

CERTIFICATE OF SERVICE

I certify that on November 15, 2018, the foregoing Reply Brief was filed with the Clerk of this Court using the CM/ECF system, which will send electronic notice of such filing to counsel of record for all parties.

/s/ *Daniel G. Rosenthal*
Daniel G. Rosenthal

Dated: November 15, 2018

4819-6417-4202, v. 1